

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 243 OF 2017

Mohmad Murshid Jalal Ahmed Ansari ...Appellant
Versus
The State And Anr. ...Respondents

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Mr. Vineet Randive i/by Mr. Kunal V. Phoole, Advocate for the Appellant.

Mr. Harsh Dedhia i/by Mr. H. S. Venegavkar, Special P. P. for UOI.

Mr. H. J. Dedhia, APP for the Respondent – State.

CORAM : **PRAKASH D. NAIK, J.**
DATE : **1st MARCH, 2022.**

PER COURT :

1. This is an appeal under Section 374 of Code of Criminal Procedure (for short “Cr.P.C.”) challenging the judgment and order dated 3rd February, 2017 passed by the learned Sessions Judge, Daman in Sessions Case No.16 of 2015. The appellant (accused No.1) has been convicted for offence under Section 370(3) of Indian Penal Code (for short ‘IPC’) and sentenced to suffer rigorous imprisonment for Ten years and to pay fine of Rs.2,000/-. The applicant is acquitted for offences punishable under Sections 3, 4, 5, & 6 of the Prevention of Immoral Traffic (Prevention) Act, 1956. (for short “PITA” Act.)

2. The prosecution case is as under :-

- i. The victim girls were called from their place of residence i.e. Swapnerpur, Bangladesh under the pretext of providing job and indulged them in prostitution by fraud. The accused exploited the victim girls by trafficking them and inducing them to indulge in prostitution.
- ii. The Report was lodged by NGO with Daman Police Station about prostitution activities conducted at Utsav Hotel, Devka, Nani Daman.
- iii. Accused No.1 Mohmad Murshid was the pimp for providing the minor victims on consideration.
- iv. The PSO attached to Daman Police Station, verified the information. He heard the conversation between the complainant and accused No.1 and laid the trap. The accused were arrested. The crime was registered against them. Investigation was handed over to PW-7.
- v. The victim girls were taken in custody from the hotel. The accused Nos.1 and 4 brought the victim girls from Bangladesh. Accused No.3 was waiter in Utsav Hotel. On completing investigation, report was

submitted under Section 173 of Cr.P.C. to the Court of Learned J.M.F.C., Daman. Since the offence under Section 370(3) of IPC is exclusively triable by the Court of Sessions, the case was committed to Sessions Court vide order dated 12th October, 2015.

3. Charge was framed against the accused vide order dated 15th February, 2016 for offence under Section 370(3) r/w Section 34 of IPC against the accused Nos. 1 to 4. Accused Nos. 2 and 3 were charged for offence under Section 3 of PITA Act. All the accused were charged for commission of offences under Sections 4, 5 & 6 of PITA Act r/w Section 34 of IPC.

4. The prosecution examined seven witnesses. PW-1 & PW-2 are victims. PW-3 - Mr. Sohil Ali is the Police Inspector. PW-4 Ms. Usha Halpati was working as Home Guard. PW-5 - Nikesh Kadam is working with NGO. PW-6 - Rahul Shah is also attached with NGO. PW-7 Harichandra Jethwa is the PSO, who conducted the investigation of the crime.

5. Radiology examination of victims i.e. PW-1 and PW-2 was conducted and the certificates/reports dated 8th July, 2015 was submitted. Both these documents are marked as Exhibit Nos. 31 & 32. The age of the victim (PW-1)

as per radiology examination is 20 years and the age of the victim (PW-2) is more than 20 years.

6. Learned Advocate for the appellant submitted that the judgment of the trial Court convicting the appellant is erroneous. It is contrary to evidence on record. The prosecution has not proved the charge beyond doubt. Although the trial Court has held that PW-3 and PW-7 were not competent officers to conduct investigation under the PITA Act and the appellant was acquitted for offence under the PITA Act, he has been convicted for offence under Section 370(3) of IPC. There is no evidence to establish the charge under Section 370(3) of IPC. The accused, who had allegedly brought the victim girls is absconding. There are serious discrepancies in the evidence of PW-1 and PW-2 and other witnesses. There is no evidence to arrive at the findings that the victim girls were exploited by the appellant. The evidence of witnesses suffers from serious omissions and contradictions.

7. Learned counsel for respondent No.2 submitted that there is sufficient evidence to convict the appellant for offence under Section 370(3) of IPC. The victim have categorically stated that the appellant has participated in the

crime. He was acting as pimp. The victims were taken to various places for prostitution. Considering the evidence adduced by the prosecution against appellant, the trial Court has rightly arrived at findings that he is involved in commission of crime. The charge has been proved beyond doubt. Merely on account of the acquittal of the accused under the provisions of PITA on the ground of competency of the officers, the appellant is not entitled for acquittal under Section 370 of IPC. On the basis of secret information and with the help of the NGO, the place of offence was raided. Conversation initiated between the accused and the member of NGO has been proved. The appellant/accused was present at the place of incident. The conversation indicate involvement of the appellant. Amount was handed over to the appellant/accused. He was apprehended on the spot. Minor discrepancies would not demolish the case of the prosecution. Apart from the victim, there is evidence of other witnesses which corroborates the evidence of PW-1 and PW-2. He relied upon the decision of the Apex Court in the case of Hema V/s. State through Inspector of Police, Madras, (2013) 10 SCC 192.

8. The case of the prosecution is that the victims

were brought by cousin of one of the victim from Bangladesh to India. The alleged role of the appellant is that he was acting in connivance with the absconding accused Kulsum. The victims were subjected to prostitution.

9. PW-1 Miss 'S' is one of the victim. She deposed that she was residing at Daman before the incident. She came to India with her sister Kulsum. The other victim 'B' (PW-2) came to India. Murshid and Rahul were residing with her sister. Her sister told her that she would provide her job in Beauty Parlour. However, she was taken to hotel. She came to know that dirty work is done at the hotel. She told her sister that she would not do dirty work (flesh business). Her sister told her that she will have to do the work. She will have to return the amount spent by her to bring victim to India. Her sister told her to work for one month, and she should pay her money from her earnings and she can leave for Bangladesh. Rahul and Murshid were associated with her sister in that job. She identified accused Murshid. She stated that she does not know other two accused. She was taken to various hotels for prostitution. Accused Murshid and another boy were taking her to hotels. On the day of incident she was in hotel. She did not know the

name of hotel. The other victim was also in that hotel. She was sitting in one room alone. Police came there with some people at hotel. Police took her and other victim with them. In cross examination she stated that her statement was recorded. It was not read over to her. She came to India from Bangladesh travelling in two buses and went to Kolkata. She do not possess visa or passport. Her evidence suffers from following omissions.

- i. Her sister Kulsum brought her to India from Bangladesh.
- ii. Bisti (PW-2) came to India before her.
- iii. Two persons met her at the house of sister.
- iv. Murshid was residing in the room of her sister.
- v. She had asked her sister about the job and she told her that she will give her job of beauty parlor and took her in morning.
- vi. Her sister took her to hotel.
- vii. Two boys came and took her to hotel.
- viii. After reaching the hotel she came to know that dirty work is done there and she told her sister that she will not do that job.
- ix. Her sister told her that she have to do that job.
- x. Her sister asked her to return money immediately which she had spent on her to bring her to India.

xi. She told her sister that she should sent her to Bangladesh first and then she would return money to her.

xii. Her sister told her that she should do that work for one month and whatever she will earn she should pay it to her and then she will take her to Bangladesh.

xiii. Her sister forced her to do that job against her will.

xiv. Rahul and Murshid were associated with her sister in that job. (It is mentioned in her statement that Rahul and Murshid were the pimps and getting the work done against her will.)

xv. Murshid and another person were taking her to various hotels. On the day of incident she was sitting in separate room and hearing the song on her mobile phone.

10. From the evidence of this witness it is evident that appellant has not brought her to Daman from Bangladesh. She has not stated that appellant played fraud upon her by promising her job. She was not forced into prostitution by appellant. The fact that her protests with sister were not reflected in her statement indicate that she was voluntarily indulging in prostitution. She was major at the time of incident. She has not referred to exploitation by appellant.

11. PW-2 is another victim. She stated that one month prior to incident she was residing at Daman. She came to India with Kulsum. She was brought by Kulsum with assurance of giving job. She was taken to house of Kulsum. PW-1 was also residing with Kulsum. No male member was residing with them. When she came to Daman, Kulsum told her that she got the job and she will go to Hotel. One person took her to hotel. He is not present in the Court. Kulsum was conducting every transaction. For a period of one month prior to the incident, she was not well, hence, she did not go anywhere. On the day of incident she was told that she will know what work, she should do after reaching hotel. She reached hotel, police and NGO came there. On the day of incident, she was assaulted and forced to go to hotel. She was told nothing. Since the witness resiled from her previous statement learned P.P. was permitted to put the questions in the form of cross examination. She stated that it is not true to say that when she was at Bangladesh, Murshid gave her phone call. It is not true to say that after coming to Daman, she was residing with Rahul and Mohammed Murshid. She came to know that Rahul and Mohammed Murshid are pimps and indulging the women in prostitution. They were talking to customers and sending her and other girls to them. They

were forcing her to do that job against her will. It is true that, on the day of incident, they had sent her to hotel. It is not true to say that, Mohemmed Murshid and Rahul are present in the Court. Earlier also she was brought to Court by Police. Her statement was recorded before the Magistrate. In that statement she stated that Rahul and one person brought her to India under the promise of giving job. She stated before Magistrate that she was asked to do the job which was not good. Rahul assaulted her and forced her to do that job. She also stated before the Magistrate that she did that job. Police came and saved her. She also stated before the Magistrate that she do not want to do that job and want to go back to Bangladesh. From the evidence of this witness it can be seen that the name of Murshid appears in her deposition. There is no identification of accused. She has not identified the appellant as the accused, who was involved in the crime. In the cross examination she stated that before the Police she mentioned that Kulsum had brought her to India. She came to India one month prior to incident. Kulsum had told her that she got the job and she has to visit hotel. Kulsum was doing whole transactions. She was ill for one month and on the day of incident she was assaulted and forcibly sent to hotel. Kulsum did nothing to her but she told her that she has

no work and she will have to do that job. She cannot assign any reasons as to why the above facts are not mentioned in her statement. She further deposed that she had named Mohammed Murshid. She volunteered that she had stated the name to the Police but Police had written Mohamed Mosim.

12. PW-3 - Sohil Ali is Police Inspector. He has deposed that he was SHO at Nani Daman Police Station. Few members of NGO informed him that illicit trafficking is going in one of the Hotel at Devka, Nani Daman. Decoy was instructed to act as customer. Dummy customer was arranged namely Rahul. Call was made to person namely Murshid. He stated that he is ready to arrange girls for sex at hotel Utsav. Panchas were arranged. Dummy customer had money transaction with Murshid. All reached Utsav Hotel and caught Murshid. Rs.2,000/- were found in his possession. He told that two girls were present in hotel. Enquiry was made with both girls (PW-1 & PW-2). They told them that Murshid had brought them to that hotel. The accused and the girls were brought to the Police Station. In the cross examination he stated that there was no special appointment of the officer to investigate the offence under Immoral Trafficking (Prevention) Act. PSI Harish Jetwa was also not

the special officer appointed under the said Act. They did not obtain search warrant before actual search. He did not record any ground to believe to enter into premises without warrant. Panch Ushaben Halpati and Vitthal Kashyap were the home guards. Vitthal was working as cook at the Police Station, Nani Daman. He did not attempt to call any panchas from the locality where the hotel was located. He did not mention in his statement that on phone Murshid told the NGO member that he is ready to supply the girls. He has not stated in the statement about the denomination of four currency notes of Rs.500/- each. He has not stated in his statement about drawing seizure panchanama of vehicles. When the NGO members met him, he enquired with them now they got number of Murship. They stated that they were secret informant. They cannot disclose his name. The NGO members did not tell him that they were knowing Murshid, since beginning. He did not transcript the cellular talk between the member of NGO and accused Murshid. He was at the distance from dummy customer in the hotel, where he could not hear him.

13. From evidence of PW-3 it is gathered that, he was SHO at Nani Daman Police Station. He acted on information

of NGO. He did not verify the identity of NGO. He has no special appointment to investigate offences under immoral traffic Act. His subordinate PSI Jetwa was also not the Special Officer appointed under the Act. They did not obtain search warrant. Panch Ushaben Halpati and Vitthal Kashyap were home guards. Vitthal is cook at Nani Daman Police Station. He did not mention in his statement that Murshid told the NGO member that he is ready to supply girls. He has not stated about denomination of four currency notes of Rs.500/- each. He did not stated about drawing seizure panchanama vehicles.

14. PW-4 Usha Halpati acted as panch witness. On 30th June, 2015 she was on duty at Nani Daman Police Station. Vitthal was the other panch. Member of NGO met PW-3. Trap was arranged. Panchanama Exhibit-20 was recorded. They went near hotel Utsav. Dummy customer went to hotel. Two girls and a man were in the hotel. One person was found in possession of Rs.2,000/-. His name was Murshid. Currency notes were same given to dummy customer. Murshid stated that he is pimp. He gave names of other persons working with him. The girls disclosed their names. Vehicles seized. Currency notes were attached.

Mobile recovered from Murshid. Panchanama prepared. In the cross examination she stated that on the entrance of that hotel there was one gate and reception counter could be seen from the road. The vehicle in which they went there were stopped about 10 mtrs. away from the Hotel. The vehicle, where it were stopped could not be seen from the reception counter and vice-versa. She did not see whom dummy customer talked. She did not see whom dummy customer paid money. They did not carry the seal of the Police Station.

15. PW-4 cannot be said to be independent panch witness. PW-3 has stated that she is home guard. PW-4 was on duty at Police Station Nani Daman on 30th June, 2015. No attempts were made by PW-3 to find out persons from local area to act as panchas. The other panch Vitthal was also home guard. He was also working as cook at same police station. She admitted that, she did not see to whom dummy customer paid money. She did not see with whom dummy customer had a talk. They did not carry seal of police station.

16. PW-5 Nikesh Kadam was working with NGO. According to him, information was received by him that person namely Mohamad Murshid brings girls and indulge them in prostitution in that area for gain on getting

information on 30th June, 2015, the members of NGO approached Nani Daman Police Station. He made phone call to Murshid from his cell phone and talked with him about girls. He replied that he would make available minor girls and told him to visit hotel Utsav. Murshid demanded Rs.2,000/- towards charges. Rahul was made decoy customer. They proceeded to hotel Utsav. Rahul was sent to hotel Murshid came there. He had talk with Rahul. On signal of Rahul they went to hotel Utsav. Two minor girls were present. Police apprehended Murshid. Amount of Rs.2,000/- was found with him. Girls told their names. They were from Bangladesh. They told that, they were forced to indulge in prostitution. He lodged the report with Police. In the cross examination he stated that, he joined NGO on 21st November, 2019. He went to hotel Utsav twice before the current raid and enquired about availability of girls. He was told that, girls will be made available. He did not lodge complaint on both the occasions. His conversation with Murshid was not recorded. Before he had talk with Murshid on the day of incident, he met him. He was knowing him prior to incident. Rahul talked with person at the gate of hotel Utsav. He did not hear talk between said person and Rahul. Before giving money to Rahul, his personal search was not taken nor it was

verified that he was having other currency notes. After paying money by Rahul to that person both went inside the hotel. Girls were not at the gate. He stated to the Police while lodging the report that, two girls had come on the gate. Those girls came on the gate from out of the hotel. On recovering the amount of Rs.2,000/- from Murshid, PI- Sohil kept those currency notes with him in his pocket.

17. PW-5 is interested witness. He is member of NGO. According to him he was knowing Murshid. He did not lodge complaints. On previous occasions the case of prosecution is that information was received from secret informant and hence the NGO approached Police. However, this witness had all the information. He stated that girls came from outside the hotel. The prosecution case is that girls were in the hotel. According to him Rahul paid money to Murshid. PW-4 has stated that she did not see to whom dummy customer paid money. It is pertinent to note that dummy customer is also associated with NGO.

18. PW-6 Rahul Shah is Member of NGO. About the raid, he reiterated versions of PW-5. According to him Murshid was standing on gate of Utsav lodge. He met him. two girls came from opposite. He paid amount to Murshid.

He gave signal to team. Murshid was apprehended. Amount was recovered. Before raid he never met Murshid. He never visited hotel Utsav in the past. He did not state to the Police that he is doing work of NGO. He knows Nikesh because he is from same locality. Nikesh (PW-5) did not tell him why he is bringing him to Daman. The two girls came from outside. He stated before the Police while giving statement that, Nikesh has made call to Murshid and asked 'Aa gaya kya' and her replied that 'Aa gaya'. This fact is not mentioned his statement. He stated to Police that, when Jivani saheb asked him to when he paid money, he told him that it was paid to Murshid. This fact is not reflected in his statement. The fact that Jivani Saheb took out money from Pocket of Murshid is not mentioned in his statement. He had no talk with accused Murshid, two girls, owner as well as the waiter of the hotel. After the raid, his personal search was not taken. The name of two girls were told to him by NGO members.

19. The above witness (PW-6) is trying to give an impression that he is independent person to give sanctity to his role as dummy customer. PW-5 has stated that PW-6 was with all members of NGO. When they approached Police Station. They told Jivani about information received by

them. PW-6 stated that he came with PW-5 to Daman. In the examination in Chief he stated that, he is attached NGO through PW-5. He cannot be considered as independent person arranged by Police for conducting raid. He stated that those girls came from outside. He had no talk with Murshid, girls and hotel owner. His evidence contains omissions.

20. PW-7 - Mr. Harichandra Jethwa, was posted at Nani Daman Police Station. PI - Mr. Sohil (PW-3) Informed him that they have to lay trap. One decoy was with NGO. Four currency notes of Rs.500/- were given to decoy. All of them went to Devka for hotel Utsav. Decoy went to hotel. One person came there. Decoy paid him money. Two girls came. Person who took money was apprehended. He told his name as Murshid. Amount was recovered from him. He admitted that apart from the statements of victim girls, he did not make any inquiry, where they came from. He did not try to reach the address given by them as well as to meet persons named as their guardian or the parents. He also did not write letter to their parents to take them back. He did not send the intimation to Bangladesh embassy. He did not make any inquiry with the victim whether they have any relation in India. It did not transpire in his investigation that a lady

namely Kulsum was residing in Daman. He recorded statements of victims. The absconding accused Kulsum had role in the crime. She was bringing the girls from Bangladesh to Calcutta and then trafficking them in Gujrat. All the accused had connection with Kulsum. He recorded statement of victim (PW-2) in Gujarati. She was not knowing Gujarati. Statement of PW-1 was also recorded in Gujarati. She was not knowing Gujarati. PW-1 told her that her sister Kulsum had brought her to India from Bangladesh. He cannot assign any reason as to why it is not mentioned in his statement that sister of PW-1 had brought her to India. PW-1 did not tell him that PW-2 came to India first. She also did not state before him that accused Murshid was residing in the room of Kulsum. She did not state that, she asked her sister about the job and she told her that job would be provided for working in Beauty Parlour. She did not state that her sister took her to hotel. She did not state that, two boys came and took her to hotel. She did not state that after reaching the hotel she came to know that dirty work is done there and she told her sister that she will not do that job. She also did not state that, her sister told her that she has to do that job. She did not state that her sister asked her to pay the amount immediately which she has spent for bringing her to India.

She did not state that she told her sister that she should drop her Bangladesh first and then she would return her money. She did not state that she should work for a month and earning should be given to her then only she can go to Bangladesh. She did not state that her sister was forcing her to that job against her will. She also did not tell her that Rahul and Murshid were associated with Kulsum and that another boy was taking her to various hotels. PW-2 did not state that Kulsum had brought her to India from Bangladesh. She did not state that one month before the incident, she was brought to India. She did not state that Kulsum told her that she will provide her job in India. She did not state that PW-1 is residing with her. She did not state Kulsum told her that she has got the job and she has to go to hotel. She did not state that Kulsum was handling all transactions. She did not state that she was not well for one month and on the day of incident she was assaulted and forcibly sent to hotel. The name of Murshid was not disclosed. It did not transpire in investigation that Murshid had gone to Bangladesh. It did not transpire that Murshid and Kulsum were residing in one room. It was transpired that Kulsum and victims were residing in one room. He did not get victims medically examined for the purpose of sexual assault. PSI did not

obtain warrant from the higher authority for raid. He has not specially designated officer under PITA act. After entering the door of the hotel there is reception counter at the distance of about 2 mtrs. inside from the door. Before the incident he was not knowing the accused Murshid.

21. The trial Court has convicted the appellant for offence under Section 370(3) of IPC. In Paragraph - 13 of the decision it was observed that the Special Police Officer or trafficking police officer are authorized and empowered to investigate the crime under the PITA Act. PW-3 and PW-7 were not competent to make investigation and the search under the provision of PITA Act. The appellant/accused was acquitted for offence under the PITA Act.

22. From the tenor of these witnesses as stated above, it is apparent that there are serious discrepancies in the evidence. Undisputedly, it is the case of the prosecution that PW-1 is the cousin of accused Kulsum. At the relevant time she was residing at Daman. She is absconding. PW-1, and PW-2 were brought by Kulsum from Bangladesh. The appellant had no role in that regard. It is alleged that the appellant was associated with Kulsum. It is not proved that the appellant was occupying room premises with Kulsum and

the victims. There is discrepancy with regards to the identity of the appellant. PW-2 had initially not supported the prosecution case. In Cross examination she has given some admissions. However, she denied that Murshid is present in Court. PW-3 and PW-7 were not appointed officers to investigate the offence under the PITA Act. The trial Court has given benefit to the accused and acquitted for the said offence. Independent persons were not examined. Panch witnesses were not independent. Decoy was associated with NGO. The witnesses have deposed that the victim girls came from the outside the hotel. It is difficult to believe that the victims were taken to the hotel and subjected to trafficking by the appellant. There are serious omissions as pointed out herein above. Considering the infirmities as stated herein above it cannot be said that the prosecution has been able to prove the charge beyond reasonable doubt. The information was received that the victims were minor. The radiological test conducted during the course of investigation mention that they were aged about 20 years. There are serious omissions in the evidence of the victims with regards to the fact that they were forced to indulge in trafficking. Considering these circumstances, the accused is entitled for benefit of doubt and the appeal is required to be allowed.

23. Hence, I pass the following order:

ORDER

- i. Criminal Appeal No. 243 of 2017 is allowed.
- ii. The Judgment and order dated 3rd February, 2017 passed by the Learned Sessions Judge, Daman in Sessions Case No.16 of 2015, convicting the appellant for offence under Section 370(3) of IPC is set aside and the appellant is acquitted.
- iii. The appeal stands disposed of accordingly.

(PRAKASH D. NAIK, J.)